

JOHN R. PICKETT)	
Claimant)	
VS.)	
)	Docket No. 220,745
DSI TRANSPORTS, INC.)	
Respondent)	
AND)	
)	
INSURANCE CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds that claimant has not proven by a preponderance of the credible evidence that he was an employee or a statutory employee of respondent on the date of accident.

When considering whether an employer/employee relationship exists, the primary test utilized in Kansas is whether the employer has the right of control and supervision of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control, which determines. McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790, (1994).

In this instance claimant, the owner of a tractor rig, contacted respondent and was advised where he could pick up a load of fuel. It was claimant's responsibility to transport the fuel to the appropriate location in the manner in which claimant so chose. Respondent controlled where the fuel went but not the manner of delivery.

Additional factors which can be used to determine whether an employment relationship exists includes; whether the payment was made by piecework or by the hour, who furnished the tools and equipment, the right to employ assistants and supervise their activities, and whether the work was part of the regular business of employer.

In this instance, the tractor belonged to claimant, although the respondent did provide the trailers which hauled the fuel. With regard to payment, claimant was provided 69 percent of the gross revenues of each haul instead of wages. No taxes were taken out of his money by respondent.

A significant dispute was raised by claimant regarding who paid the highway taxes on the vehicle, whether claimant had the right to charge fuel to the respondent, who purchased the license tags for the truck, who paid fuel taxes, and who paid the taxes on the truck. While claimant alleges respondent paid for all of these items, on cross-examination, claimant acknowledged that the money to pay these items was actually deducted from claimant's share of the gross revenues rather than coming from respondent.

A review of the entire file convinces the Appeals Board that claimant is an independent contractor rather than an employee of respondent. The Order of Administrative Law Judge denying benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated September 18, 1997, entered by Administrative Law Judge Floyd V. Palmer should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
M. Joan Klosterman, Kansas City, MO
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director